FOR [illegible]
DISTRIBUTED
APR 6 19
OFFICE OF THE C

Nos. 91-744 and 91-902

APR 1 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners/Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents/Cross-Petitioners.

On Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE, INC. SUPPORTING RESPONDENTS/CROSS-PETITIONERS

ROBERT A. DESTRO
Columbus School of Law
Catholic Univ. of America
Washington, DC 20064
(202) 319-5140

A. ERIC JOHNSTON
Seier, Johnston & Trippe
2100 Southbridge Parkway
Southbridge Bldg., Ste. 376
Birmingham, AL [illegible]
(205) 879-9100

JAMES BOPP, JR.
Counsel of Record
RICHARD E. COLESON
Branaman, McCormick,
Bopp & Abel
191 Harding Avenue
P.O. Box 410
Terre Haute, IN 47808-0410
(812) 238-2421

Counsel for Amicus Curiae

Graphics [illegible], Indianapolis, IN [illegible]

19 pp

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

QUESTION DEALT WITH HEREIN

1. Does the undue burden test provide a workable and constitutionally sound standard of review for reviewing abortion legislation?

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE QUESTIONS PRESENTED i

QUESTION DEALT WITH HEREIN i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. *Roe v. Wade* is Unworkable 2

A. *Roe* Appeared to Give States Some Latitude to Restrict Abortion But Has Not Done So In Practice 2

B. The Trimester Framework Is Tied to Advances in Medical Technology, Making Legislative Enactment Virtually Impossible 3

C. *Roe* Did Not End the Abortion Controversy, But Has Distorted the Law in Many Areas.. 7

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts 7

a. Tort Law — Development of Fetal Rights 8

b. Wrongful Death 9

c. Wrongful Birth 10

d. Homicide of the Unborn 10

e. Other Areas 11

2. *Roe* Has Been Used to Argue for an Expansive Interpretation of the Right of Privacy 12

3. *Roe* Has Distorted the Law Regarding Rules of General Application 12

a. Statutory Construction 12

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings 13

II. If the Undue Burden Test Is to Be Used, A Workable Standard Must Be Clearly Articulated 14

A. The Undue Burden Test Is Not Workable as Unterstood and Applied by the Third Circuit 15

1. The Third Circuit Failed to Understand That in Determining Whether the Burden Is Undue the Effect on the Class, Not Some Individuals, Must Be Considered .. 15

2. The Third Circuit Failed to Recognize Compelling State Interests Which It Should Have Recognized 15

a. The Court Erred In Failing to Recognize the Father's Compelling Interests 16

b. The Court Erred in Failing to Recognize the Compelling Interests in Protecting the Unborn Throughout Pregnancy ... 17

3. The Third Circuit Erred in Holding That the Spousal Notice Provision Would Have Been Impermissible Even With a Compelling Interest For Not Being Narrowly Drawn 17

B. Assuming the Continued Existence of Constitutional Protection for Abortion Above the "Rational Basis" Level, the "Undue Burden" Test Might Be Workable if This Court Sets Forth Clear Standards 18

1. Any Statute, Regardless of Whether It Imposes an Undue Burden, Will Be Upheld if It Reasonably Furthers a Compelling Interest 18

2. The States Have Compelling Interests, Including the Protection of Unborn Life, Which Exist Throughout Pregnancy 20

3. Statutes Which Result in Fewer Abortions Would Reasonably Further the State's Interest in Protecting Unborn Life and Would Be Constitutional 21

4. Failure to Establish the Above Three Elements of the Undue Burden Test Would Result in Ad-Hoc, Multi-Factor Balancing, Yielding Unclear Guidelines 21

III. The Rational Basis Test Is Preferable to the Undue Burden Test 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

American College of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986) 4

Boubrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) 8

Boucia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) 12

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) ..... *passim*

Colautti v. Franklin, 439 U.S. 379 (1979) 5, 6

Cruzan v. Director, 110 S. Ct. 2841 (1990) 12

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 22

Davis v. Davis, No. E-14496, slip op. (Cir. Ct. for Blount Cty. Tenn. Sep. 21, 1989) 11

Davis v. Davis, 1990 WL 130807 (Tenn. App. 1990) 11

Dietrich v. Northampton, 138 Mass. 14 (1884) 8

Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Hernandez v. Garwood, 390 So.2d 357 (Fla. 1980) 9

H. L. v. Matheson, 450 U.S. 398 (1981) 15

Hodgson v. Minnesota, 110 S.Ct. 2926 (1990) 19, 24

Hogan v. McDaniel, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977) 9

Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) 11

In re Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) 12

Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) 9

Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) 11

Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) 9

Margaret S. v. Edwards, 488 F.Supp. 181 (E.D. La. 1980) 4
Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990) 24
People v. Smith, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976) 11
Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 462 U.S. 476 (1983) 13
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 16
Rodos v. Michaelson, 396 F. Supp. 768 (D. R.I. 1975), *vacated for lack of standing of plaintiffs*, 527 F.2d 582 (1st Cir. 1975) 5
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981) 16, 20
Schulte v. Douglas, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Womens' Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) 5
State v. Brown, 378 So. 2d 916 (La. 1979) 11
State v. Gyles, 313 So.2d 799 (La. 1975) 11
State v. Soto, 378 N.W.2d 625 (Minn. 1985) 11
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... *passim*
Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975) 10
United States v. Vuitch, 402 U.S. 62 (1971) 4
Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134 (1980). 10
Webster v. Reproductive Health Services, Inc., 492 U.S. 490 (1989) 3, 14, 17, 25
Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985) 10
Williamson v. Lee Optical, 348 U.S. 483 (1955) 25

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

18 Pa. Cons. Stat. Ann. § 3210(c) 13
N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§ 8, 9 10
18 Pa. Cons. Stat. Ann. § 3209 15

OTHER AUTHORITIES

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U.J. Public Law 181 (1989) 7, 12, 13
Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461 (1989) 10
Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989) 7
Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250 (1975) 10
Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U.L. Rev. 917 (1988) 23
J. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, 1800-1900 (1978) 10
Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349 (1970) 9
W. Prosser, *Handbook on the Law of Torts* (4th ed. 1971) 8
Prosser and Keeton on the Law of Torts (W. Keeton ed. 5th ed. 1984) 9
Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) 21

BRIEF AMICUS CURIAE OF NATIONAL RIGHT TO LIFE COMMITTEE, INC. SUPPORTING RESPONDENTS/CROSS-PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various lawful political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the primary promoters of laws restricting abortion to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within the limits set by those decisions and have sought, through lawful means, those changes in the law which would allow full legal protection for the unborn. The National Right to Life Committee, Inc. seeks to advance its interests by addressing the legal issues herein.

SUMMARY OF THE ARGUMENT

Because *Roe v. Wade* is unworkable and has no proper constitutional foundation, support for it is eroding. In place of

[1]This brief is filed with permission of all the parties. Letters indicating this permission have been filed with the Clerk of this Court.

Roe's strict scrutiny analysis, the United States Court of Appeals for the Third Circuit in this case employed the undue burden test, which Justice O'Connor previously suggested that this Court has applied to abortion legislation. However, the Third Circuit misunderstood the test and misapplied it with regard to the spousal notice provision which it struck down. As interpreted by the Third Circuit, the undue burden test is unworkable. If this Court should decide to establish an undue burden analysis to govern constitutional abortion jurisprudence, it must set out a clear and workable undue burden analysis. The focus of this analysis is whether the state has compelling interests throughout pregnancy. A majority of the Justices of this Court has recognized (directly or indirectly and in separate opinions) that there are compelling interests in protecting unborn life and maternal health which exist throughout pregnancy. This needs to be clearly established in order to make an undue burden analysis workable. However, the very existence of special constitutional protection for abortion is questionable and has no majority support on this Court. Therefore, it would be preferable to hold that the rational basis test governs constitutional abortion jurisprudence.

ARGUMENT

I. *Roe v. Wade* Is Unworkable.

A. Roe *Appeared to Give States Some Latitude to Restrict Abortion But Has Not Done So In Practice.*

This Court, in *Roe v. Wade*, declared that the right to abortion is not absolute: "The Court has refused to recognize an unlimited right of this kind in the past." Roe, 410 U.S. 113, 154 (1973). Rather, the Court stated, "[T]his right . . . must be considered against important state interests in regulation." *Id.* This is so, the Court noted, because the abortion privacy right "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . ." *Id.* at 159. The difference is that "[t]he

pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus." *Id.*

The state interests justifying regulation of abortion mentioned by this Court were the interests in protecting maternal health and "the potentiality of human life." *Id.* at 162. Although the *Roe* majority appeared to give some effect to these interests by declaring them compelling at certain points in pregnancy, effectuation of these interests has proven elusive. The reality has been abortion on demand throughout pregnancy. Even modest attempts to regulate abortion have routinely been struck down. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting) ("[T]oday the Court astonishingly goes so far as to say that the State may not require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure . . . .").

B. *The Trimester Framework Is Tied to Advances in Medical Technology, Making Legislative Enactment Virtually Impossible.*

Both petitioners and certain amici argue that *Roe's* trimester framework "fairly accommodates competing interests," "provides clear guidance to state governments and lower courts," and "provides a workable, predictable framework within which states can regulate abortion and courts can review such regulations."[2] Entirely apart from the arbitrary and essentially legislative nature of *Roe's* trimester regime,[3]

---

[2]Brief of Petitioners, Cross-Respondents at 27-31; Brief Amici Curiae for Rep. Don Edwards et al. at 24 (herein); Brief Amici Curiae of the States of New York et al. at 13-14 (herein).

[3]*Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 460-61 (1983) (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 789, 794-95 (White, J., dissenting), 814-15 (O'Connor, J., dissenting) (1986); *Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 518-19 (plurality opinion by Rehnquist, C.J.) (1989).

the experience of the federal courts in trying to administer the trimester scheme indicates otherwise. Roe is "workable," but only in the sense that virtually no regulations designed to safeguard maternal health or protect fetal life are constitutional.

For example, in *Roe*, the Court held that after viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65. In the companion case *Doe v. Bolton*, the Court defined the scope of the health exception, relying upon its earlier opinion in *United States v. Vuitch*, 402 U.S. 62 (1971):

> [T]he medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health.

Doe, 410 U.S. at 192.

Given this expansive definition of "health," it is doubtful whether *any* statute attempting to limit post-viability abortions would be constitutional. The authority purportedly conferred upon the States to proscribe abortion after viability has proved to be illusory. In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in dicta that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Bolton*. 737 F.2d at 298-99. Legislative attempts to restrict post-viability abortions have been uniformly rejected. *See, e.g., Margaret S. v. Edwards*, 488 F.Supp. 181, 191 (E.D. La. 1980) (Louisiana statute prohibiting abortions after viability unless necessary "to prevent permanent impairment to [the woman's] health" held

unconstitutional becuse "[p]reserving maternal health means more than preventing permanent incapacity" and "[a] rape or incest victim may not be able to prove that her mental health will be permanently impaired if she is forced to bear her attacker's child, but she might be able to show that it is necessary to preserve her immediate mental health"); *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (statute which prohibited abortion after viability unless "necessary to preserve the woman from imminent peril that substantially endangers her life or health" held unconstitutional); *Rodos v. Michaelson*, 396 F. Supp. 768 (D. R.I. 1975), *vacated for lack of standing of plaintiffs*, 527 F.2d 582 (1st Cir. 1975) (striking down statute prohibiting post-quickening abortions except when "necessary to preserve the life of the mother").

Notwithstanding the Court's recognition of the states' interest in promoting maternal health, reasonable legislative measures intended to make sure that the abortion choice represents an *informed* decision after consultation with the woman's physician have also been routinely struck down. *See, e.g., Thornburgh*, 476 U.S. at 759-64; *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 442-49 (1983).

The trimester system has proven to be unworkable in other respects, as well. The "bright lines" drawn between the trimesters have become blurred. Attempts to set viability at a definite stage in pregnancy so that enforcement of the laws applicable after viability could be based on objective criteria have been struck down. *See Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

And, although *Roe* itself indicated that states could require abortions performed after the end of the first trimester to be performed in hospitals, *Roe*, 410 U.S. at 163, this Court retreated from this position in the *Akron* case, striking down a second-trimester hospitalization requirement, *Akron*, 462

U.S. at 433-39. This change in doctrine was attributable to recent medical advances, under which the City of Akron's ordinance requiring second trimester hospitalization was no longer "reasonable" because it departed from "accepted medical practice." *Id.* at 436-38. The Court's approach to abortion regulation, i.e., making the determination of constitutionality turn upon medical standards in effect at the time the case reaches the Court, is "completely unworkable." *Id.* at 454 (O'Connor, J., dissenting). It requires a state to determine what is "acceptable medical practice" not only for each type of abortion performed, but also for each type of abortion at each week of pregnancy within each trimester. *Id.* at 456. States must not only "continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to 'depart from accepted medical practice' insofar as particular procedures and particular periods within the trimester are concerned," *Id.* at 456 (O'Connor, J., dissenting), but must also predict what the "accepted medical practice" will be four or five years in the future when the case may ultimately reach the Supreme Court. Even if the regulation is constitutional when enacted and is upheld by the Court, it could be attacked later based on new medical standards.

As a result of this Court's decisions in *Colautti* and *Akron*, the states have no practical ability to regulate according to the lines established by the trimester system in *Roe*. By tying the states' ability to regulate abortion to ever-shifting medical technology and "accepted medical practice," the Court effectively removed from the states' elected representatives the ability to regulate abortion and placed such decisions within the hands of the medical profession. Instead of engendering stability in the law, this has led to extreme instability in the law. This is additional evidence of the unworkability of the *Roe* trimester framework.

C. Roe *Did Not End the Abortion Controversy, But Has Distorted the Law in Many Areas.*

Roe v. Wade was intended to settle the issue of abortion in American law. However, recognizing *Roe's* weak constitutional foundation, abortion rights advocates continue to assert other constitutional theories. *See, e.g.*, Brief of Petitioners/Cross-Respondents at 15-16, 19 n.27, 33, 39-40, 46-48 (equal protection); Brief Amicus Curiae of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8 (ninth amendment). *But see* Brief Amicus Curiae of Life Issues Institute in Support of Respondents/Cross-Petitioners (herein) (dealing with equal protection and ninth amendment claims); Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. Contemp. L. 131 (1989) (discussing and refuting alternative constitutional theories for an abortion right). Because of its weak foundation, *Roe* exacerbated the abortion controversy.

Moreover, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. Because of this fact, *Roe* has worked a distortion on the normal functioning of the law wherever abortion jurisprudence touches the law. This abortion distortion effect is evident in several areas set forth below.

1. *Roe* Has Confused the Law Protecting the Unborn in Non-Abortion Contexts.

One of the areas in which the abortion distortion effect is most evident is in the law designed to protect preborn human beings in non-abortion contexts. In these areas, *Roe* poses a direct obstacle to the realization of important objectives embodied in laws which recognize and protect unborn human life, in that it has inhibited development of the law in these areas. Examples include the rights of the unborn in tort law, wrongful death actions, in equity, in criminal law, and in laws relating to respect. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3

B.Y.U. J. Public Law, 181, 246-83 (1989) (discussing the abortion distortion effect of *Roe* on fetal rights in non-abortion contexts).

a. Tort Law — Development of Fetal Rights

The development of the law in the area of torts reveals the dramatic change in the legal protection of the rights of unborn human beings with the progress of scientific knowledge about the fact that each unique, individual human being comes into being at the moment of conception.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus. He held that "the unborn child was a part of the mother at the time of the injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, there occurred "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts." W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The *Bonbrest* court reasoned:

> As to the viable child being 'part' of its mother — this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extrauterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element — as that term is generally understood. Modern medicine is replete with

> cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Some states limit recovery to post-viability injuries, but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton*, *supra*, at 368-69; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970). The first court to abandon the viability standard declared what ought to be the guiding principle for all courts: "[L]egal separability should begin where there is biological separability." *Kelly v. Gregory*, 282 A.D. 542, 543, 125 N.Y.S.2d 696, 697 (1953). The court noted that it was the knowledge derived from medical science which powered the engine for change. *Id.* at 543-44, 125 N.Y.S.2d at 697-98. Yet despite the recognition of the rights of the unborn in this area, *Roe* has constrained the full development of tort law — especially inhibiting some courts from providing protection for the preborn before the point of viability — and as shown in the following examples.

b. Wrongful Death

A majority of jurisdictions now recognize a wrongful death cause of action for the death of a preborn human being — some rejecting the action unless the child is born alive and then dies and some allowing only post-viability actions. *Roe* has been cited by courts rejecting wrongful death actions for preborn humans[4] and by courts limiting the cause of action to viable

---

[4]*See, e.g., Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (en banc); *Hernandez v. Garwood*, 390 So.2d 357 (Fla. 1980); *Hogan v. McDaniel*, 204 Tenn. 253, 559 S.W.2d 774 (Tenn. 1977).

unborn children.[5] *Roe's* viability line makes no more sense in wrongful death actions than it made in *Roe*, but *Roe's* pernicious effect on this part of the law is clear.

c. Wrongful Birth

Roe v. Wade has even been used by courts recognizing wrongful birth claims, wherein parents seek damages for the birth of a "defective" child whom they would have aborted if they had been apprised of the defect. As of September 1988, seventeen state courts of appeal had recognized a wrongful birth claim. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 462 (1989).

d. Homicide of the Unborn

Following the English statutory and common law pattern, early nineteenth century American law prohibited feticide by statutes and, in some cases, by common law, which also encompassed abortion. *See* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Cal. L. Rev. 1250, 1273-82 (1975). For example, New York in 1828 made it a felony to willfully cause the death of a fetus even before quickening. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 26-27 (1978) (citing N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§8, 9 at 550). When *Roe v. Wade* swept away the state abortion statutes the protection provided the unborn from homicide was also swept away.

Roe has had a detrimental effect on the states' efforts to protect the unborn from homicide outside the abortion context.

---

[5]*See, e.g., Toth v. Goree, 65 Mich. App. 296, 237 N.W.2d 297 (1975); Wallace v. Wallace*, 120 N.H. 675, 421 A.2d 134 (1980) ("We remark also in passing that it would be incongruous for a mother to have a a federal constitutional right to deliberately destroy a nonviable fetus, Roe v. Wade [citation omitted], and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."); *Werling v. Sandy*, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985).

For example, the California Supreme Court overturned a murder indictment brought against a man for killing an unborn child by kneeing his ex-wife's abdomen, saying, "I'm going to stomp it out of you." *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (en banc), by applying the archaic born-alive rule. When the California legislature promptly redefined the homicide statute to expressly include the killing of a fetus, a California appellate court declared that *Roe* had removed the protection of a non-viable fetus because "as a matter of constitutional law the destruction of a non-viable fetus is not a taking of human life." *People v. Smith*, 59 Cal. App. 3d 751, 755, 129 Cal. Rptr. 498, 502 (1976). Following the California courts and *Roe*, many states have held that *Roe* denies the protection of homicide laws to the unborn.[6] This anomalous result shows *Roe's* distorting effect on the law.

e. Other Areas

Roe has also had a deleterious effect on other areas of the law relating to the rights of the unborn. In *Davis v. Davis*, No. E-14496, slip op. (Cir. Ct. for Blount Cty. Tenn. Sep. 21, 1989), a state court listened to exhaustive expert testimony as to whether frozen embryos were children, i.e., individual human beings, or property. Having determined from the scientific evidence that the embryos were children, the judge held that it was in their best interest to be awarded to their natural mother for implantation in her womb. On appeal, the Tennessee Court of Appeals relied in part on the state abortion statute imposed on that state by *Roe* to conclude that the unborn were not legal persons and the constitution protected Mr. Davis from becoming a parent against his will. The Court gave the Davises joint control of the embryos (as property) — dooming them to destruction. *Davis v. Davis*, 1990 WL 130807 (Tenn. App. 1990) (now on appeal to the Tennessee Supreme Court). Under the

---

[6]*See, e.g., State v. Gyles, 313 So.2d 799 (La. 1975); State v. Brown, 378 So. 2d 916 (La. 1979); State v. Soto, 378 N.W.2d 625 (Minn. 1985); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).*

influence of *Roe*, the court ignored the fact that Mr. Davis had already become a parent when he consented to in vitro fertilization with his sperm and the fertilization was accomplished.

2. *Roe* Has Been Used to Argue for an Expansive Interpretation of the Right of Privacy.

Roe has also served as the basis for claims for an expansive interpretation of the right of privacy. For example, it has been argued that there is a privacy right to die, which would encompass assisted suicide, contrary to long-standing public policy, and allow the withdrawal of nutrition and hydration from incompetent but not terminally ill patients. *See, e.g., In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (euthanasia); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (suicide); Cruzan v. Director, 110 S. Ct. 2841 (1990). The notion that the right of privacy can be readily extended to encompass whatever someone might desire, springs from the manner in which Roe was created without a proper foundation in the Constitution.

3. *Roe* Has Distorted the Law Regarding Rules of General Application.

Roe v. Wade also set procedural precedents for distortion of common rules of adjudication. *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 299-350. This was especially evident in *Thornburgh*, 476 U.S. 747, the high-water mark of *Roe's* analysis.

a. Statutory Construction

The abortion distortion factor was at work in the *Thornburgh* decision where this Court ignored the principle that a court should avoid constitutional problems by giving a statute a constitutional construction where fairly possible. The

Pennsylvania law at issue in *Thornburgh* required a second physician to be present at post-viability abortions to care for the possibly surviving child. 18 Pa. Cons. Stat. Ann. §3210(c) (Purdon 1983). For emergency purposes, the law provided that it is "a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgment, . . . that the abortion was necessary to preserve maternal life or health." *Id.* Although in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476, 482-86 (1983), this Court construed a similar second-physician provision to include an emergency provision for the life or health of the mother — even though none existed — this Court could not bring itself to do so in the Pennsylvania case and struck down the statute. *Thornburgh*, 476 U.S. at 771.

Justice White took the *Thornburgh* majority members to task for their willingness to disregard this principle of statutory construction:

> The Court's rejection of a perfectly plausible reading of the statute flies in the face of the principle — which until today I had thought applicable to abortion statutes as well as to other legislative enactments — that '[w]here fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.' *Planned Parenthood Ass'n v. Ashcroft* [citation omitted]. The Court's reading is obviously based on an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.

Id. at 812 (White, J., dissenting). *See* Bopp & Coleson, *The Right to Abortion*, *supra*, at 315-32 (extended discussion of abuse of the above principle in abortion cases).

b. Evidentiary Standards Applicable to Preliminary Injunction Hearings.

Another example of the abortion distortion effect at work is found in *Thornburgh*, where this Court rushed to a judgment

on the merits from the appeal of a grant of a preliminary injunction. Shortly before the statute at issue in *Thornburgh* was to go into effect (but four months after the statute had been enacted), the plaintiff abortion providers filed forty affidavits, which became the basis of a court-ordered stipulation, and requested a preliminary injunction. Pennsylvania was not allowed to contest Plaintiffs' facts unless it could give evidence at the hearing on the preliminary injunction. Because of the limited time available, no evidence was submitted by the commonwealth. Brief for Appellant at 35-49, *Thornburgh*, 476 U.S. 747. The parties were assured that the stipulation would be used solely for the purpose of the hearing. *Id.*

However, on appeal, the appellate court went to the merits and held the Pennsylvania abortion law largely unconstitutional. *Id.* at 8. The *Thornburgh* Court followed suit. In dissent, Justice O'Connor noted the abortion distortion effect at work in these words: "If this case did not involve state regulation of abortion, it may be doubted that the Court would entertain, let alone adopt, such a departure from its precedents." *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

With such effects flowing from *Roe*, the erosion of support for *Roe* is unremarkable. The question of what standard will supplant *Roe* remains.

II. If the Undue Burden Test Is to Be Used, A Workable Standard Must Be Clearly Articulated.

This Court's failure to affirm *Roe* in recent cases suggests that the Court views *Roe's* trimester framework as unworkable. The Court's splintered *Webster* decision led the Third Circuit to adopt Justice O'Connor's undue burden test as the appropriate standard for reviewing abortion legislation. However, as understood and applied by the Third Circuit, that test is also unworkable. Your amicus submits that an undue burden standard should not be adopted unless a workable standard is clearly articulated and adopted by this Court.

A. *The Undue Burden Test Is Not Workable as Understood and Applied by the Third Circuit.*

1. The Third Circuit Failed to Understand That in Determining Whether the Burden Is Undue the Effect on the Class, Not Some Individuals, Must Be Considered.

The Third Circuit held that §3209, the spousal notice provision, "is likely to dissuade many from seeking an abortion if such notification is required" so that "§3209 constitutes an undue burden on a woman's abortion decision." *Planned Parenthood v. Casey*, Opinion of Third Circuit, Appendix to Petition for a Writ of Certiorari in No. 91-902 at 70a (1991). However, as dissenting Judge Alito correctly pointed out, "it appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown." *Id.* at 90a (Alito, J., dissenting). Justice O'Connor has set forth the principle as follows: "the mere possibility that *some women* will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it." *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) (emphasis in original). Thus, the Third Circuit misunderstood and misapplied the undue burden test with regard to its effect on some women. Clarifying this issue is especially important for upholding parental notice/consent statutes under the undue burden analysis. Although such requirements may prevent some minors from seeking abortion, that does not make of the requirements an undue burden. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (finding no undue burden in the parental notice statute upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981)).

2. The Third Circuit Failed to Recognize Compelling State Interests Which It Should Have Recognized.

Where compelling state interests exist, the undue burden test requires only that a statute "bears a rational relationship

to legitimate purposes such as the advancement of these compelling interests." *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). Not only was the Pennsylvania spousal notice provision, §3209, not an undue burden, as demonstrated *supra*, but the presence of compelling interests meant that — even if the burden had been undue — Pennsylvania had only to show that its statute was rationally related to its legitimate purpose in advancing its compelling state interests. However, the Third Circuit failed to recognize compelling state interests as part of its analysis. Three such compelling interests apply to the review of abortion restrictions.

a. The Court Erred In Failing to Recognize the Father's Compelling Interests.

In the case of *Scheinberg v. Smith*, 659 F.2d 476 (1981), the Fifth Circuit considered an abortion spousal notice and consultation statute. In that case, Florida asserted two interests of the father as compelling: "maintaining and promoting the marital relationship; and protecting a husband's interest in the procreative potential of the marriage." *Id.* at 483. The Fifth Circuit telescoped these two interests into one, "a state interest in furthering the integrity of the state-created and regulated institutions of marriage and the family," and held this interest to be "sufficiently weighty to justify the burden on a woman's abortion decision imposed by the spousal notification requirement." *Id.* (citation omitted). The Fifth Circuit concluded that "[t]he state interest sought to be furthered by this legislation . . . [e]ncompasses furthering the institutional integrity of the marital relationship, and of the family. We have held that interest to be, in constitutional terms, compelling, and thus ample justification for establishing spousal notice and consultation requirements." *Id.* at 486.

By ignoring that legitimate and compelling interests a husband has in the integrity of the marriage relationship and in a particular preborn child, as well, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 93 (1976) (White, J.,

J.) ("[T]he husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife."), the Third Circuit altered the undue burden analysis in a way fatal to §3209, the spousal notice provision.

b. The Court Erred in Failing to Recognize the Compelling Interests in Protecting the Unborn Throughout Pregnancy.

The Third Circuit also altered the undue burden analysis applicable to the Pennsylvania statute by failing to recognize the interest in protecting unborn life which exists throughout pregnancy. A majority of the Justices of this Court have recognized such an interest. *See Thornburgh*, 476 U.S. at 828 (O'Connor and Rehnquist, JJ., dissenting); *Webster*, 109 S. Ct. at 3055, 3057 (plurality opinion), 3064 (Scalia, J., dissenting) (calling for the plenary reversal of *Roe*, presumably thereby recognizing at least a compelling interest in protecting unborn life).

3. The Third Circuit Erred in Holding That the Spousal Notice Provision Would Have Been Impermissible Even With a Compelling Interest For Not Being Narrowly Drawn.

Finding that §3209, the spousal notice provision, imposed an undue burden, the Third Circuit said, "[W]e must apply strict scrutiny to determine if §3209 is narrowly tailored to serve a compelling state interest." *Planned Parenthood v. Casey*, Opinion of Third Circuit, Appendix to Petition for a Writ of Certiorari in No. 91-902 at 71a (1991). This was erroneous, for no narrowly tailored requirement is applicable under the undue burden test. "The Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Akron*, 462 U.S. at 467 n.11 (O'Connor, J., dissenting). Rather, abortion

restrictions under the undue burden test need only "'reasonably related' to the state compelling interest." *Id.*

Therefore, the Third Circuit erred when it declared, "[E]ven if we were to assume that [keeping married individuals together in wedlock] does constitute a compelling state interest, we could not conclude that the Commonwealth has carried its burden of demonstrating that §3209 is narrowly tailored to promote that interest." Opinion of Third Circuit at 72a.

B. *Assuming the Continued Existence of Constitutional Protection for Abortion Above the "Rational Basis" Level, the "Undue Burden" Test Might Be Workable if This Court Sets Forth Clear Standards.*

If this Court should choose to employ an undue burden test for abortion jurisprudence, although your amici believe a rational basis test to be more workable and constitutionally correct, *see infra*, such a test might be workable if this Court sets forth clear guidelines. These include the following, as articulated in prior opinions by Justice O'Connor and other members of this Court.

1. Any Statute, Regardless of Whether It Imposes an Undue Burden, Will Be Upheld if It Reasonably Furthers a Compelling Interest.

The "undue burden" test is as follows:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of . . . compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree. . . .

> And if a state law does interfere with the abortion decision to an extent that it is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review, . . . the possibility remains that the statute will withstand the stricter scrutiny."

Thornburgh, 476 U.S. at 828 (O'Connor, J., & Rehnquist, C.J., dissenting) (citations omitted). The legitimate purposes to which such regulations might be addressed include "compelling interests in ensuring maternal health and in protecting potential human life, and [those] interests exist 'throughout pregnancy.'" *Id.*

Applying the test involves the following steps:

1. A "threshold inquiry" into whether the nature and degree of the regulatory interference are rationally related to a legitimate governmental objective.
   a) if the regulatory burden is not rationally related to a legitimate governmental objective, the regulation fails, *see Hodgson v. Minnesota*, 110 S.Ct. 2926, 2950 (1990) (O'Connor, J., concurring in part, and concurring in the judgment in part) ("broad sweep" and "failure to serve the purposes asserted by the State in too many cases");
   b) if the regulatory burden is rationally related to a legitimate governmental interest, and its only impact is to "'inhibit" abortions to some degree,'" even a 'significant'" one, the rational basis finding ends the judicial inquiry, *Akron*, 462 U.S. at 463-64 (O'Connor & Rehnquist, JJ., dissenting);
   c) if, however, the nature and degree of the interference may fairly be described as one "involving absolute obstacles or severe limitations on the abortion decision" the burden is "undue" and "it becomes 'necessary to apply an exacting standard of review.'"
2. At this stage of the inquiry, the weight of the interests asserted by the State are examined, *Akron*, 462 U.S. at 465 nn. 10 & 11 (O'Connor & Rehnquist, JJ., dissenting);

a) If the State interests are not "compelling" the regulation fails;
b) Because the Court has never actually imposed a requirement that an abortion regulation needs to be "'narrowly drawn' to express only the relevant state interest" (notwithstanding implications to the contrary in *Roe*), *Akron*, 462 U.S. at 467 n. 11 (O'Connor & Rehnquist, JJ., dissenting), the regulation needs only to be rationally related to a compelling state interest in order to "withstand the stricter scrutiny."

Because there is no question, even under *Roe* itself, that the states have both a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," and "*another* important and legitimate interest in protecting the potentiality of human life", *Roe*, 410 U.S. at 149-150, 162 (emphasis in original), *quoted in Akron*, 462 U.S. at 450 (O'Connor & Rehnquist, JJ., dissenting), the issue for the Court — should it decide to adopt the undue burden analysis — is whether those interests are "compelling" throughout pregnancy.

2. The States Have Compelling Interests, Including the Protection of Unborn Life, Which Exist Throughout Pregnancy.

As noted previously, *see supra* II-A-2-b, a majority of the members of this Court has recognized that states have compelling interests in unborn life and maternal health which exist throughout pregnancy. This needs to be established in a single, majority opinion, if the undue burden test is to be workable. In addition, it should be recognized, as the Fifth Circuit held in *Scheinberg*, *see supra* II-A-2-a, that husbands have special interests in the integrity of the marital unit and the procreative activity occurring therein which are separate compelling interests. These interests, too, should be

recognized by a majority of this Court if the undue burden test is to be employed.

3. Statutes Which Result in Fewer Abortions Would Reasonably Further the State's Interest in Protecting Unborn Life and Would Be Constitutional.

The recognition of a compelling interest in protecting unborn life throughout pregnancy, as a majority of the Justices have done, would not require the states to enact laws restricting abortion. However, it would allow them to do so if they so chose, provided it is done in a reasonable manner. Given the compelling interest in protecting unborn human life, any statute which results in fewer abortions would reasonably further that state interest. This needs to be clearly articulated for an undue burden test to be workable.

4. Failure to Establish the Above Three Elements of the Undue Burden Test Would Result in Ad-Hoc, Multi-Factor Balancing, Yielding Unclear Guidelines.

The critical legal issue to be determined here is how judges and legislators are to assign a constitutional "weight" to state and paternal interest in the preservation of "the individual fetus." Without such guidance, the "undue burden" test is unworkable.

One of the "the fundamental aspiration[s] of judicial decisionmaking" is to apply "neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time.'" *Akron*, 462 U.S. at 458 (O'Connor & Rehnquist, JJ., dissenting) (citation omitted). *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15-16 (1959) ("[T]he main constituent of the judicial process is that it must be genuinely principled, resting

with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . . .").

The alternative is ad hoc, multi-factor "balancing" which is, by its very nature, unpredictable and "ill suited to the judicial function," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 94, (1987) (Scalia, J., concurring in part and concurring in judgment). Multifactor balancing is inconsistent with the undisputed power of the states to make and effectuate at least some political judgments concerning the balance to be struck between public and private interests in the abortion context. *See Roe*, 410 U.S. at 162-164 (post-viability); *Thornburgh*, 476 U.S. at 785-86 (White and Rehnquist, JJ., dissenting) ("decisions that find in the Constitution principles or values that cannot be fairly read into that document usurp the people's authority"); *Akron*, 462 U.S. at 458 (O'Connor & Rehnquist, JJ., dissenting) ("the Court's framework forces legislatures, as a matter of constitutional law, to speculate").

Moreover, making the *weight* of the relevant state and private interests depend upon a multi-factor balance was the way in which the Court departed from "evenhanded appli[cation of] uncontroversial legal doctrines," *Thornburgh*, 476 U.S. at 814 (O'Connor, J., & Rehnquist, C.J., dissenting), in Roe. Such balancing is the source of the "major distortion in [its] constitutional jurisprudence" wrought by the Court's abortion decisions, *id.*, and the reaason that "no legal rule or doctrine [involving regulation of abortion] is safe from ad hoc nullification." *Id.*

By rejecting the trimester analysis of *Roe*, but not addressing the nature of either the rights or the state interests necessarily implicated in abortion, a majority of the members of this Court have rejected multi-factor balancing as the standard of review for abortion cases. In

so doing, it has set the stage for a return to evenhanded application of black-letter constitutional law principles.

The Court can reverse the decision of the Third Circuit with respect to §3209 in either of two ways. First, it can adopt the view that nothing in the Constitution prohibits a finding that the state interest in the preservation of fetal life is "compelling" throughout pregnancy. See, e.g., *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). In the alternative, it can recharacterize the nature of the right recognized in Roe as something less than "fundamental."

A decision limited to a discussion of the "compelling" nature of the State's interest would leave intact *Roe's* holding that there exists some quantum of constitutionally protected interest in the context of abortion (above the minimal protection provided by the rational basis requirement), and, necessarily, this Court's role in deciding what it is. A decision which recharacterizes the nature of the interest recognized in *Roe v. Wade* would effectively overrule the case and return the issue to the states from whence it came.

Justice White has correctly recognized that the difference between abortion and other reproductive decision-making "does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself." *Thornburgh*, 476 U.S. at 792 n.2.

Your amici respectfully submit that the second option suggested above — overruling *Roe* — is more consistent with the Constitution because the weight *Roe* assigns to the interests are, as Professor Gottlieb suggests, "a complex choice, not a clear deduction from constitutional text." Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term In Constitutional Adjudication*, 68 B.U.L. Rev. 917, 949 (1988). Petitioners make essentially the same point in defense of their

argument that the undue burden test should be rejected, Petitioners' Brief at 34-38, but argue the opposite conclusion: that the Court should explicitly reaffirm the balance struck in *Roe*. Petitioners' Brief at 24-31 & nn.47-50. But if the ad hoc balancing which has characterized the case law since *Roe* is to be replaced with "black letter" constitutional law in most cases, it is essential that the states be free to act on their view that their legitimate interest in fetal life is "compelling." A single, familiar standard applicable to abortion cases is essential for legislatures, public officials who must interpret and apply the law, and — most importantly — for the courts called upon to engage in a constitutional review of such policy choices.

III. Rational Basis Test Is Preferable to the Undue Burden Test.

Directly or by implication, five Justices have required only a rational basis test in recent abortion litigation, indicating their belief that there is no general, fundamental abortion right. *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972, 2977, 2983-84 (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, J.J.); *Ohio*, 110 S.Ct. at 2981; *Hodgson v. Minnesota*, 110 S.Ct. at 2944 (Stevens, J., joined by O'Connor, J.); *id* at 2945 (the court); *id* at 2949 (O'Connor, J., concurring in part and concurring in the judgment in part).

A clear majority ruling on a rational basis would be preferable to employing the undue burden test for several reasons. First, it would not spawn additional ligitation as an undue burden test would. Second, the rational basis test has a long pedigree, is well indicated, and is easily applied. Third, the rational basis test squarely addresses the issue of whether there is a fundamental right to choose abortion. This needs to be done to eliminate the presumption of invalidity which automatically attaches to laws interfering with fundamental

rights and replace it with the assumption of validity which accompanies rational basis review.

Strict scrutiny is not necessary since there is no fundamental right. While the undue burden test, described ante, may provide an adequate test, there is no reason to labor and confuse lower courts with a new test for which exploratory litigation will be necessary when federal jurisprudence already has the fully developed and well understood rational basis test. *Thornburgh*, 476 U.S. at 802 (White, J., joined by Rehnquist, J., dissenting), *citing Williamson v. Lee Optical*, 348 U.S. 483 (1955).

The adoption of the rational basis test for abortion regulation will also permit this court to avoid the intricate and complex regulation that fundamental rights or undue burden jurisprudence imposes on it. *Webster*, 109 S.Ct. at 3057 (Rehnquist, C.J., joined by White & Kennedy, J.J.) and *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting). The issue remains rightfully with the states.

CONCLUSION

The *Roe* framework is unworkable and has resulted in confused constitutional application and an intricate and complex system of judicially imposed regulation. Provided abortion remains a limited fundamental right, an undue burden analysis would be workable, as a substitute for *Roe*, if the Court finds the state has a compelling interest in potential life.

However, because abortion is not properly a fundamental right, the Court should employ the well established rational basis test. That test provides clear rules of construction for presumptively valid statutes or regulations. This case offers the opportunity to end the long and distorted constitutional history of the so-called "right to abortion." In any event, this Court should affirm the decision in No. 91-744 and reverse the decision in No. 91-902.

Respectfully submitted,

ROBERT A. DESTRO
Columbus School of Law
Catholic Univ. of America
Washington, DC 20064
(202) 319-5140

A. ERIC JOHNSTON
Seier, Johnston & Trippe
2100 Southbridge Parkway
Southbridge Bldg., Ste. 376
Birmingham, AL 35209
(205) 879-9100

JAMES BOPP, JR.
Counsel of Record
RICHARD E. COLESON
Brames, McCormick,
Bopp & Abel
191 Harding Avenue
P.O. Box 410
Terre Haute, IN 47808-0410
(812) 238-2421

April 6, 1992

Counsel for Amicus Curiae